STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 31, 2007
v	No. 267374 Ingham Circuit Court
MICHAEL FREDERICK CHRISTLE, Defendant-Appellant.	LC No. 05-000330-FC

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years of age), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age) concerning an incident with his then 12-year-old stepdaughter. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 10 to 25 years for the CSC I conviction and 5 to 15 years for the CSC II conviction. We affirm.

On appeal, defendant first claims that the interviewing detective's testimony that the complainant told her that defendant had touched her clitoris was inadmissible hearsay, which resulted in him being denied a fair trial. We disagree.

Unpreserved, constitutional error may be considered on appeal if the alleged error was plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To obtain relief in this regard, a defendant must show that he was actually innocent, or that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless there is an exception that allows it to be introduced. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003).

At trial, the challenged statement was elicited when the detective was asked why she did not refer the victim to a doctor. The detective testified that the penetration the victim had described to her had taken place nine months earlier, so there would be no evidence of the touching. The detective further testified that the victim had told her that defendant had touched

her "citreous"[1], and that in her experience with the female genitalia, the labia cover and protect the "citreous."

After reviewing the testimony in context, no plain error occurred. The statement was not plainly offered for the truth of the matter asserted because, as argued by plaintiff, it is apparent that the prosecutor asked the detective what the complainant had stated as a reference for the detective to make a lay opinion under MRE 701 as to the female anatomy in relation to the area that the complainant stated had been touched. Specifically, MRE 701 provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

This Court has held that a registered nurse properly testified under MRE 701(a) as to her observations and findings during the examination of a sexual assault victim. *People v McLaughlin*, 258 Mich App 635, 657-658; 672 NW2d 860 (2003).

Under MCL 750.520a(p), which defines "sexual penetration" for purposes of CSC I, intrusion into the female genital opening is sufficient.[2] *People v Whitfield*, 425 Mich 116, 135 n 20; 388 NW2d 206 (1986); *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). Here, under MRE 701(b), it is plain that the detective, as a female, was providing a lay explanation of the female anatomy to the jury, which was relevant for purposes of the CSC I charge in this case. Accordingly, no plain error occurred.

Defendant next asserts that testimony from the detective concerning the victim's statements was improper opinion testimony that bolstered the victim's credibility and served as a conclusion by the detective of the defendant's guilt. We again disagree.

It is improper for a witness to express an opinion on the defendant's guilt of the charged offense. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). Further, "[a]llowing witnesses to testify as to questions of law invites jury confusion and the possibility that the jury will accept as law the witness's conclusion rather than the trial judge's instructions." *People v Lyons*, 93 Mich App 35, 47; 285 NW2d 788 (1979).

Here, defendant challenges the detective's testimony concerning the complainant's statement that defendant had touched her clitoris. The detective was asked if the complainant indicated whether there was penetration. In response, the detective answered, "Yes, she did. She

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[1] Believed to actually refer to "clitoris."

[2] "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(p).

stated that he had touched her on her citreous." The detective further testified that in her experience with the female genitalia, the labia cover and protect the "citreous."

No plain inferences can be made from the testimony that the detective was opining as to whether she believed defendant was guilty. Even if the admission of her statements that a full gynecological exam was unnecessary for "legal purposes" and from "a legal point of view" given the nature of the allegations coupled with the time that had elapsed, did amount to plain error, reversal is still not required because her opinion did not prejudice defendant. The statements did not negatively impact defendant's case and did not positively impact the credibility of the complainant. The complainant had already testified that defendant touched her clitoris and the detective's later statements merely amounted to the detective opining that there was no reason to attempt to gather any physical evidence from the complainant given the circumstances and that she was familiar with the location of the clitoris on female genitalia. Accordingly, no substantial rights were violated.

Defendant next argues that trial counsel was constitutionally ineffective for failing to object to the alleged improper testimony discussed above. We disagree.

For purposes of clarification and before delving into defendant's specific arguments concerning ineffective assistance of trial counsel, we note that we have thus far and will continue to treat this appeal as one being filed by a defendant who was represented by counsel at the trial court level. This is necessarily so, as defendant did not unequivocally waive his right to counsel prior to or during the trial. See *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005). Indeed, while some suggestion was made that defendant wished to represent himself, defendant explained that he "technically d[id]n't want to represent [him]self" but rather wanted his counsel to assist him during trial and to be able to ask witnesses certain questions to ensure those questions were asked. Moreover, the record evidences that defense counsel was actively engaged as counsel throughout, including questioning all of the witnesses and conducting opening and closing arguments. Because defendant's request was anything but unequivocal, we conclude that he did not waive his right to counsel or, as would follow, his right to challenge defense counsel's performance. We thus proceed to defendant's arguments concerning defense counsel's representation.

Defendant's ineffective assistance of counsel claim is unpreserved because the claim was not raised below in a proper request for an evidentiary hearing or in a motion for a new trial. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Thus, review is limited to errors apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant bears a heavy burden. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Specifically, a defendant must show that counsel's performance was objectively unreasonable and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Id.* at 600.

As to the first claim of error, defendant's ineffective assistance argument fails because the statement was not improper. Defense counsel cannot be deemed ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). As to the second claim of error, assuming it was objectively unreasonable not to ask that the opinion be disregarded, the opinion was not prejudicial. Again, the statements consisted of the detective

opining that there was no reason to attempt to gather any physical evidence from the complainant given the circumstances. As such, that there is not a reasonable probability that the outcome of the trial would have been different had the statement been objected to and disregarded. *Carbin, supra* at 600.

In his Standard 4 brief [3], defendant relies on certain appendices attached to his brief that are not found in the record in arguing that his trial counsel should have investigated certain matters and called certain witnesses in an attempt to discredit the complainant. While review of an ineffective assistance claim is limited to the record on appeal, see *People v Mack*, *supra*, we will review the appendices attached to his brief for purposes of determining whether a remand for a *Ginther* hearing is necessary.

A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Decisions about whether to call or question witnesses or about what evidence to present are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a witness amounts to ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* A substantial defense is one that might have made a difference in the outcome of the trial. *Kelly, supra* at 526.

Defendant argues that his trial counsel should have questioned the Family Independence Agency employee about her interview with defendant's children. Defendant contends that counsel should have then called the children as witnesses to contradict the complainant's report that in the summer of 2004, defendant and his wife executed certain forms of punishment that he claims did not occur.

Assuming that defendant's children would have testified that there was no punishment of the type reported by the complainant, given the credibility contest that occurred during trial, defense counsel could have attempted to discredit the complainant by calling those witnesses to testify. Further, the report itself could have been used to discredit the complainant in light of her testimony at trial that defendant did not physically abuse or punish her in any way. However, this would be a collateral matter at best, and would appear to have been an attempt to elicit hearsay. Even if trial counsel was objectively unreasonable for not calling those witnesses and for not relying on the report, there is not a reasonable probability that the result would have been different. The fact that the complainant may have told different stories concerning punishment exacted by defendant does not render her statement(s) concerning sexual contact by defendant incredible. Defendant's remaining challenges in regard to alleged objectively unreasonable trial strategy (unclear date of the incident, whether one teacher as opposed to a different one allowed complainant to talk to her best friend at school about the incident, counsel's failure to call an expert on abuse) are without merit as they are similarly incapable of creating a reasonable probability that the result would have been different. Remand is thus unnecessary.

[3] See Administrative Order No. 2004-6, Standard 4 (permitting a defendant to file a brief in propria persona).

Defendant also asserts that his appellate counsel was ineffective for failing to raise the issue addressed in his standard 4 brief either by a motion for new trial or a motion for remand. Apparently, defendant is arguing that because appellate counsel failed to move for a new trial or move for remand, a *Ginther* hearing is no longer available to him. In that regard, he argues that appellate counsel was ineffective.

A defendant has a constitutional right to the effective assistance of counsel on his appeal as of right. See *Evitts v Lucey*, 469 US 387, 396-397; 105 S Ct 830; 83 L Ed 2d 821 (1985) ("A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney."). Nevertheless, in this instance, defendant's argument fails, as there is nothing that precludes us from reviewing the alleged failures by defendant's trial counsel to determine whether remand for a *Ginther* hearing is appropriate. While review for an ineffective assistance claim is limited to the record on appeal, see *Hawkins v Murphy*, 222 Mich App 664, 670; 565 NW2d 674 (1997), this panel is not precluded from reviewing the appendices attached to the Standard 4 brief for purposes of reconsidering whether a *Ginther* hearing should be held. See MCR 7.211(C)(1)(a) (providing that a motion under subrule (C) must be supported by an affidavit or offer of proof). Accordingly, defendant's arguments can (and were) still be reviewed for purposes of determining whether remand is necessary. Appellate counsel was thus not ineffective.

Defendant finally argues that his convictions are against the great weight of the evidence. We disagree. An unpreserved claim that a conviction was against the great weight of the evidence is reviewed for plain error affecting substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). A verdict may be vacated as against the great weight of the evidence only when it "'does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.'" *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted).

Here, evidence was presented that defendant touched the complainant in a sexual manner. The evidence also established that she told her best friend the next day about the sexual contact and repeated the details of the contact to a protective services worker several months later. True, evidence was also presented that the complainant had a rocky relationship with defendant, that she initiated a "French" kiss between she and defendant on the date the sexual contact occurred and that she was told her actions were inappropriate. The evidence, then, presented an issue of credibility that was left to the factfinder. This Court will not interfere with a jury's role, as factfinder, in determining the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Because the jury's verdict found reasonable support in the evidence, no plain error occurred.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Deborah A. Servitto